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CHUNG FUI CHU

v.

FOO HO CHENG & ANOTHER CASE

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM JC
[DIVORCE PETITION NO: S8-33-1272-05;
ORIGINATING SUMMONS NO: 24-2856-04]
3 MAY 2010

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FAMILY LAW: Maintenance - Interim order - Setting aside - Failure to apply to set aside interim order within 30 days after service - Whether order may be set aside - Order 42 r. 13 Rules of the High Court 1980

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FAMILY LAW: Maintenance - Interim order - Setting aside - Failure by husband to comply with interim order - Whether husband's application to set aside interim order may be heard before contempt is purged

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FAMILY LAW: Maintenance - Wife and children - Application for variation of interim maintenance order - Considerations - Whether misrepresentation or mistake of fact shown in making interim order - Whether wife can be expected to quickly look for a job after break down of marriage - Whether husband had made honest and frank disclosure regarding his finances - Wife entitled to live with same comfort and standard as that enjoyed during marriage - Whether there was a material change in circumstances to justify variation of order - Law Reform (Marriage and Divorce) Act 1976, s. 83

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On 27 June 2006 the court granted an interim order, namely, that the respondent pay the petitioner maintenance of RM2,000 per month commencing from July 2006. On 16 November 2007, the court granted the *decree nisi*. On 22 November 2007 the respondent filed this application in encl. 38 seeking to reduce the payment of maintenance to the petitioner to RM300.

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Held (dismissing the respondent's application with costs):

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(1) Based on s. 83 of the Law Reform (Marriage and Divorce) Act 1976, the court has the power to vary the interim order for maintenance where the order is based on any misrepresentation or mistake of facts or where there has been any material change in the circumstances. There was no misrepresentation or mistake of fact in granting the interim order. (paras 11, 12 & 13)

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- (2) The petitioner was a housewife and had not been working for 12 years. She stayed at home to take care of the two children of ages 11 and 10 years. She cannot be expected to quickly go out and look for a job just because the marriage broke down and the respondent was reluctant to pay her an adequate maintenance. (para 13) A B
- (3) The respondent had not made an honest and frank disclosure to the court. The respondent failed to disclose information including financial information regarding his companies. The failure by the respondent to disclose the such documents, information or particulars was deliberate, dishonest and showed that the respondent did not act *bona fide*. (paras 20, 21 & 22) C
- (4) The petitioner's monthly living expenses were about RM12,000 per month, which was far in excess of the RM2,000 monthly maintenance awarded by the court. It is trite law that the petitioner is entitled to live with the same comfort and standard as that which the petitioner was accustomed to during her marriage. The respondent's application to reduce the monthly maintenance from RM2,000 to RM300 per month was very drastic and would bring down standard of living of the petitioner. There was no proof that the petitioner refused to be self-sufficient. The amount of RM2,000 was a reasonable sum to maintain the petitioner, given the respondent's status as a director. A reduction to a monthly maintenance of RM300 was unreasonable and far too low to maintain the petitioner per month. (paras 28 & 29) D E F
- (5) The respondent failed to discharge his burden of proving, on a balance of probabilities, that there was a material change in his circumstances to justify an order for variation of the monthly maintenance. (para 30) G
- (6) The respondent did not apply to set aside the interim order within 30 days after service of the order under O. 42 r. 13 of the Rules of the High Court 1980. Therefore, the respondent was bound by the interim order. (para 31) H
- (7) The respondent was in contempt of court for failure to comply with the interim order and committal proceedings could have been taken against him by the petitioner. Unless and until the respondent purged his contempt by complying with the interim order and paying the monthly maintenance and arrears fully, he should not be heard by the court regarding his application for variation of maintenance. (para 35) I

- A Case(s) referred to:**
Gisela Gertrude Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC (**refd**)
Gordon v. Gordon [1904] P 163 (**refd**)
Hadkinson v. Hadkinson [1952] CA 285
Legasri Purana Chandran v. Sreepathy Ganapathy Krishnan Iyer [2010] 8 CLJ 208 HC (**refd**)
- B** *Lim Bee Kee v. Leong Ah Chuan* [1997] 1 LNS 197 HC (**refd**)
Rose v. Rose [1950] 2 All ER 311 (**refd**)
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC (**refd**)
YCC v. LSY [2007] 7 CLJ 207 HC (**refd**)
- C** **Legislation referred to:**
Law Reform (Marriage and Divorce) Act 1976, s. 83
Rules of the High Court 1980, O. 42 r. 13

For the petitioner - M/s Jagjit Singh & Co
D *For the respondent/applicant - LY Wong; M/s Lau, Wong & Partners (m.o.b of petitioner & co-respondent)*
For the co-respondent - M/s S Sothi Leong & Partners

Reported by Amutha Suppayah

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JUDGMENT

Yeoh Wee Siam JC:

- F** [1] This is an appeal by Foo Ho Cheng, the respondent husband (“the respondent”), against my decision made in chambers on 30 March 2010 in respect of the summons in chambers filed on 22 November 2007 (encl. 38) by the respondent.
- G** **Enclosure 38**
- [2] In encl. 38, the respondent prayed for the following orders:
- H** a. The payment of RM2,000 a month to the petitioner wife (“the petitioner”) under the interim order dated 27 June 2006 (encl. 39) (“the interim order”) be reduced to RM300 a month commencing from December 2007 until the divorce petition has been heard and decided.
- I** b. The payment of the arrears of interim maintenance from July 2006 until May 2007 and September until November 2007 amounting to RM25,000 be paid in a period of two years from the date of this order.

c. Costs be in the cause.

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d. Such other relief or order that is deemed just and appropriate by this Honourable Court.

Background Facts

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[3] On 27 June 2006 the court granted an interim order, namely, that the respondent pays the petitioner maintenance of RM2,000 per month commencing from July 2006.

[4] On 16 November 2007, the court granted the *decree nisi* with the following orders:

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(i) that the marriage between the petitioner be dissolved and that the *decree nisi* be made absolute three months from 16 November 2007;

(ii) that Chen Meng Zhou, the co-respondent, be ordered to pay the petitioner RM100,000 as damages for committing adultery with the respondent;

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(iii) that the respondent be ordered to comply with the court order dated 27 June 2006 and pay the arrears of maintenance due to the petitioner within 14 days from the said order.

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[5] The *decree nisi* was made absolute on 8 April 2008.

[6] On 22 November 2007 the respondent filed the application in encl. 38 seeking to reduce the payment of maintenance to the petitioner.

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Respondent's Grounds For Application

[7] The respondent's grounds for making the application in encl. 38 ("the application") are as follows (see encls. 37 and 38):

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a. On 27 June 2006 the court gave the interim order for maintenance of RM2,000 per month to be paid to the petitioner commencing from July 2006.

b. Up to May 2007, the respondent is not able to pay the maintenance of RM2,000 per month to the petitioner due to his heavy financial burdens.

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- A c. However, the petitioner tried to pay RM2,000 per month from June 2007 until August 2007 and at the same time the respondent had made payment of RM1,000 per month for the arrears of maintenance.
- B d. The respondent has to bear the high expenses of the children's education, and also medical cards for the children and the petitioner.
- C e. In addition, since October 2007, the respondent also lost his source of income of RM1,100 from the rental of his property at unit 1-03, Blok 2A, No. 10, Jalan 5/58C, Maxwell West Tower, Gasing Heights ("unit 1-03") where such rental was used to finance the housing loan for the same property.
- D f. The balance of the respondent's income after deducting all expenses was not enough and the respondent had to take an advance loan from RGP Corporation (M) Sdn Bhd for payment of his high credit card bills.
- E g. In this situation the respondent is only able to pay RM300 per month interim maintenance to the petitioner, and the arrears of maintenance amounting to RM25,000 to be settled within a period of two years.
- h. The petitioner would try to mitigate his circumstances by getting another job to supplement his needs.

F Relevant Enclosures

[8] Several affidavits had been filed by both parties to regarding the application in encl. 38. The relevant enclosures are encls. 37, 41, 42, 43, 48, 49, 50, 51, 52, 53. Other affidavits filed in support are encls. 6, 8 and 11.

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Decision

[9] After considering all the relevant affidavits and the written submissions of both parties, I dismissed the respondent's application in encl. 38 with costs.

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Grounds Of Decision

The Law

- I [10] The respondent's application in encl. 38 is an application made under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA") which reads as follows:

83. Power for court to vary orders for maintenance.

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The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

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[11] Based on s. 83 of the LRA, the court has the power to vary the interim order for maintenance of the wife where it is satisfied that:

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(a) the order was based on any misrepresentation;

(b) the order was based on any mistake of facts; or

(c) there has been any material change in the circumstances.

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(See also *Gisela Gertrude Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133).

[12] In his grounds for the application stated in encl. 38, the respondent did not aver that there was any misrepresentation or mistake of fact at the time when the interim order was granted by the court. Therefore, it is not proper for those grounds for variation to be relied upon in the written submissions of learned counsel for the respondent (see her written submissions dated 11 August 2008).

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[13] Be that as it may, even if the court is prepared to consider the application on the ground of misrepresentation or mistake of fact, from the record of proceedings, there is nothing to prove that the court made the interim order based on misrepresentation or mistake of fact. What was shown to the court is that the petitioner is a housewife and has not been working for 12 years. She stayed at home to take care of the two children of ages 11 and 10 years. She has to send them to and from school and for their extra curricular activities. She cannot be expected to quickly go out now and look for a job just because the marriage broke down and the respondent is reluctant to pay her an adequate maintenance.

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[14] In *Rose v. Rose* [1950] 2 All ER 311 (CA), Lord Justice Somervell stated at p. 312:

but in my view, where during the matrimonial life the means of the husband were such that the wife was not required to go out and earn money, then, in determining the proper sum for maintenance, it would *prima facie* seem to be wrong that the husband should be able to say

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A Now you must go out and work, and the only sum I can be ordered to pay is one based on the results of your going out to work, which you did not have to do when you were my wife and which you would not have had to do if I had not committed adultery and broken up the home.

B (Note: In the present case, the Petitioner also alleged that the Respondent committed adultery.)

[15] Lord Justice Denning, in the same Court of Appeal case of *Rose v. Rose (supra)*, said at p. 313:

C I agree that no general rule can be laid down on the matter, but this wife is certainly under no legal duty to go out and work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so when she has to look after a young child.

D **[16]** It is not true for the respondent to aver that the petitioner set up the two companies, namely, Skin Avenue Health and Beauty (M) Sdn Bhd And Eckstein DNA Industries Bhd. when he, in his own affidavit (encl. 6), stated that he was the one who set up Skin Avenue because he did not want the petitioner to be at home.

E However, he also added that the petitioner caused him and the company lot of problems. All this shows that the petitioner is not independent in establishing or running a company. I therefore do not agree with the submissions of learned counsel for the respondent that the petitioner chose not to seek employment, even though she was capable, just because of pending divorce proceedings and she wanted maintenance. The learned judge made the interim order based on the facts presented then and I do not think the order was based on misrepresentation or mistake of fact.

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G **[17]** Therefore, the only ground left for the respondent is to prove that there is a material change in his circumstances since the making of the interim order for maintenance to justify a variation of the same order (see *Lim Bee Kee v. Leong Ah Chuan* [1997] 1 LNS 197 and *YCC v. LSY* [2007] 7 CLJ 207).

H *Whether There Is Any Material Change In The Circumstances*

[18] The respondent averred that his monthly nett income is RM10,707.25. His monthly expenditure is as follows (see encl. 37):

I	(a) Children's expenses (based on court order dated 5 July 2005)	RM2,800
	(b) Payment of bank loan for Unit 1-08 (now occupied by the petitioner and the children)	RM3,300

(c) Private school fees for the two children	RM2,000	A
(d) Payment of Bank loan for the house, Unit 1-03	RM1,256	
(e) Payment for maintenance of Unit 1-03	RM320.00	
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Balance	RM1,031.25	

[19] In addition, the respondent averred that he had to pay RM8,000 a year to buy medical cards for the two children of the marriage and also RM2,5000 a year for the petitioner's medical card (see encl. 37). Regarding the RM2,500 spent on the petitioner's medical card, which is denied by the petitioner, there is no document or proof to support it. Therefore, the court cannot accept that as an additional annual expenditure that is incurred by the respondent for the petitioner.

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[20] As submitted by learned counsel for the petitioner, the respondent has not made an honest and frank disclosure to the court. The respondent only disclosed the following documents:

- A Hong Leong Bank loan document dated 16 October 2007;
- A HSBC Account statement dated 25 February 2007;
- A Standard Chartered Bank Account Statement dated 13 March 2005 (two years ago);
- A Standard Chartered Bank Statement dated 14 October 2007.

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[21] However, the respondent has failed to disclose the following documents, information and particulars:

- that he is a director of the company where he currently works, as well as the number of companies where he is the director or shareholder.
- the companies' yearly or monthly turnover and profits.
- the income tax paid by him or his company/companies.
- the number of motor vehicles owned by him or his company/companies, and the total value of his assets or the assets of his company or companies.
- the loans taken and repayment of loans purported to have been taken by his mother or friends.

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- A [22] The court gets the impression that the failure by the respondent to disclose the above documents, information or particulars is deliberate, dishonest and shows that the respondent has not been acting *bona fide* in these proceedings.
- B [23] The respondent alleged that he had taken loans of RM20,000 from his mother as a last resort to clear the outstanding arrears of the interim maintenance. He also alleged that he took a loan from a certain friend, Hoi Meng Kong.
- C [24] The respondent's mother lives in Ipoh. It is rather strange and highly improbable that she should come all the way from Ipoh to obtain the bank drafts from different banks with branches in Puchong and Subang in Selangor. In her affidavit in encl. 33, the petitioner stated that two sons of the respondent's mother live in Petaling Jaya and one son in Jalan Ipoh. None of them live in Puchong or Subang. It is highly probable that the purported loan transactions were not carried out by the respondent's mother, but by
- D the respondent, with the intention of alleging financial difficulties.
- E [25] From the respondent's disclosure of his income and expenditure, it is clear that even if the respondent has very high expenses, he still owns the property, Unit 1-03. From what he disclosed in his affidavit, the rental value of such property is about RM1,600 per month. The respondent blamed it on the petitioner for locking the premises thus preventing him from getting it rented out to tenants. However, he also averred that he has already
- F changed the locks put there by the petitioner.
- G [26] The respondent is seeking to vary the monthly maintenance from RM2,000 to RM300 per month. If he takes proactive steps to rent out Unit 1-03, he should be able to pay the monthly maintenance of RM2,000. If he pleads that the rental has to be used to pay for the bank loan and maintenance of the property, then he has the alternative of selling Unit 1-03 and meet his obligations under the interim order.
- H [27] With whatever rental or money that the respondent can raise from the rental or sale of Unit 1-03, as the case may be, and the extra RM2,500, which the court does not think that he had spent per year on the medical cards for the petitioner, the respondent should be able to pay the monthly maintenance under the interim order.

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[28] The petitioner's monthly living expenses are about RM12,000 per month, which is far in excess of the RM2,000 monthly maintenance awarded by the court. A

[29] It is trite law that the petitioner is entitled to live with the same comfort and standard as that which the petitioner was accustomed to during her marriage. The respondent's application to reduce the monthly maintenance from RM2,000 to RM300 per month is very drastic and would bring down standard of living of the petitioner. There is no proof that the petitioner refuses to be self-sufficient, as alleged by the petitioner. The amount of RM2,000 is a reasonable sum to maintain the petitioner, given the respondent's status as a director. A reduction to a monthly maintenance of RM300 is unreasonable and far too low to maintain the petitioner per month. B C

[30] Based on the evidence adduced, the respondent is unable to discharge his burden of proving, on a balance of probabilities, that there is a material change in his circumstances to justify an order for variation of the monthly maintenance. D

Respondent Not Acting Bona Fide

[31] The interim order was granted by the court on 27 June 2006. The respondent did not apply to set it aside within 30 days after service of the order under O. 42 r. 13 of the Rules of the High Court 1980. Therefore, the respondent is bound by the interim order and he has to comply with it. However, he chose not to comply with it. He also delayed in making this application for variation (encl. 38) until 22 November 2007, which is about one year and five months after the interim order was given. E F

[32] From the record of the court's notes of proceedings, on 16 November 2007, the court granted the *decree nisi* to be made absolute in three months. At the same time, upon complaint by learned counsel for the petitioner about the respondent's non-compliance of the interim order with effect from 1 July 2006, which amounts to contempt of court, the learned judge at that time then ordered the respondent to pay the arrears of maintenance of RM32,000 within two weeks from that date ie, 16 November 2007. G H

[33] The contents of prayer (b) of encl. 38 prove that the respondent has not complied with the interim order and still owes arrears of maintenance to the respondent. I

- A [34] Strictly speaking, following the Supreme Court case of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210, a person in contempt should not be heard in his action until he has purged his contempt (see also *Hadkinson v. Hadkinson* [1952] CA 285, *Gordon v. Gordon* [1904] P 163 and *Legasri Purana Chandran @ Maniam v. Sreepathy Ganapathy Krishnan Iyer* [2010] 8 CLJ 208, High Court Malaya, Kuala Lumpur (Family Court) Divorce Petition No. S33-1375-2006).
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- [35] In this case, the respondent is in contempt of court and committal proceedings could have been taken against him by the petitioner. Unless and until the respondent purges his contempt, namely, by complying with the interim order and paying the monthly maintenance and arrears of maintenance fully, he should not be heard by this Honourable Court regarding his application for variation of maintenance. Otherwise, the respondent would not take the court's orders seriously or treat them with proper respect. Such conduct cannot be condoned by the court since it is a blatant defiance of the authority of the court and its orders.
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Temporariness Of The Interim Order

- E [36] An interim order is only intended to be an order for the interim period, namely, from the time the divorce petition is filed until the time when the court grants the divorce. It is therefore a temporary order to ensure that the petitioner, as a wife, gets some reasonable amount of maintenance until the time when the court grants a final order on maintenance at the time of granting the divorce.
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- [37] In this case, the interim order was granted on 27 June 2006. The *decree nisi* was granted on 16 November 2007. It appears to me that it was an oversight on the part of all parties that at the time when the *decree nisi* was granted, the interim order was not addressed or adjudicated and converted into a final order. After the divorce, the respondent then filed encl. 38 on 22 November 2007. In prayer (a) of encl. 38, the respondent is applying for a reduction of the monthly maintenance commencing from December 2007 until the divorce petition has been heard and decided. Prayer (a) is therefore illogical and does not make sense since the divorce petition has already been heard and decided on 16 November 2007. In the first place, action should have been taken by either party, in particular the petitioner, to apply for a final order on maintenance,
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instead of allowing the matter of maintenance to be continued under the interim order. An interim order cannot be allowed to exist indefinitely in place of a final order.

[38] The interested party is now expected to take immediate steps by filing the necessary application to convert this interim order into a final order. During that hearing, the court may reconsider the means and expenditure of both parties before making the final order for monthly maintenance for the petitioner. However, that does not relieve or excuse the respondent from his current obligation under the interim order to pay the maintenance and arrears of maintenance that are due to the petitioner.

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